STATE OF MICHIGAN

COURT OF APPEALS

KALIL JIRAKI, M.D.,

Plaintiff-Appellee,

v

WAYNE COUNTY,

Defendant-Appellant,

and

BADER CASSIN, M.D., ROBERT L. ALLEN, and MICHAEL DUGGAN, jointly and severally,

Defendants.

UNPUBLISHED
August 8, 2000

No. 210140
Wayne Circuit Court
LC No. 95-535681-NZ

Before: Markey, P.J., and Doctoroff and Murphy, JJ.

PER CURIAM.

Defendant[1] Wayne County appeals by right the trial court's order of judgment entered on the jury verdict for plaintiff in the amount of $2.3 million and from the trial court's postjudgment orders denying defendant's motion for judgment notwithstanding the verdict (JNOV) or new trial and defendant's motion for rehearing on the motion for new trial. We affirm in part and reverse in part.

Defendant asserts that plaintiff's claim under the WPA is barred because he failed to commence suit within ninety days of his termination of employment. We disagree. The issue of whether a claim is within the period of limitations is reviewed de novo on appeal. *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 324; 577 NW2d 881 (1998). In the present case, because the jury found in favor of plaintiff, "plaintiff on appeal is entitled to all factual issues being viewed in the light most favorable to [him], along with the drawing of reasonable favorable inferences from them." *Id.*

[1] Throughout this opinion, "defendant" will refer to Wayne County only.

Under the WPA, the period of limitation for an action alleging unlawful retaliatory conduct is ninety days. MCL 15.363(1); MSA 17.428(3)(1). Specifically, the WPA states:

> A person who alleges a violation of this act may bring a civil action for appropriate injunctive relief, or actual damages, or both within 90 days after the occurrence of the alleged violation of this act. [MCL 15.363(1); MSA 17.428(3)(1).]

On appeal, as correctly stated by plaintiff, defendant is now attempting to argue a position that is contrary to the position that it argued below. *Phinney v Perlmutter*, 222 Mich App 513, 544; 564 NW2d 532 (1997) ("a party may not take a position in the trial court and subsequently seek redress in an appellate court on the basis of a position contrary to that taken in the trial court"). Defendant argued successfully below that the trial court could not hear the case because plaintiff had failed to exhaust his administrative remedies before filing the action in circuit court. The court accepted defendant's position and entered an order on February 16, 1996, stating that an administrative hearing was to be held. *Paschke v Retool Industries*, 445 Mich 502, 510; 519 NW2d 441 (1994) (in order to invoke estoppel, some indication must exist that the court in the earlier proceeding accepted that party's position as true).

Further, defendant's claim that was asserted below is inconsistent with the claim that it now asserts on appeal. *Id*. (in order to invoke estoppel, the claim made in the prior proceeding must be inconsistent with the claim being made in the subsequent proceeding). In its motion below, defendant stated that plaintiff was required to exhaust his administrative remedies before proceeding to circuit court because the Civil Service Commission Rules stated that the Commission "shall set a date for a hearing of the charges not later than two weeks" after plaintiff submitted its appeal to the Commission. By asserting this argument, defendant must also accept the rule of law that a period of limitation is tolled until the employee pursues the required administrative remedies. *American Federation of State, County and Municipal Employees, AFL-CIO, Michigan Council 25 and Local 1416 v Highland Park Bd of Education*, 457 Mich 74, 90 (Cavanagh, J.), 92 (Brickley, J.); 577 NW2d 79 (1998). Defendant cannot now argue that the period of limitation was not tolled because plaintiff was not required to exhaust his administrative remedies.

Thus, as correctly stated by plaintiff, even assuming that the period of limitation began to run on the day that plaintiff was terminated, the period of limitation was tolled while plaintiff was pursuing his required administrative remedies. Because plaintiff was not granted an administrative hearing, which was required to be conducted after plaintiff requested such a hearing, up to the day

he filed this action, the period of limitation was tolled until that time. Plaintiff's claim was timely, and defendant's assertion is without merit that the WPA claim was time-barred.[2]

Defendant also asserts that plaintiff failed to prove his claim under the WPA because plaintiff failed to establish involvement in "protected activity" and a causal connection between his termination and the "protected activity." We disagree. "The determination whether the evidence established a prima facie case under the WPA is a question of law to be determined de novo." *Phinney, supra* at 553; *Terzano v Wayne Co*, 216 Mich App 522, 526; 549 NW2d 606 (1996).

MCL 15.362; MSA 17.428(2) of the WPA states:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this state, a political subdivision of this state, or the United States to a public body, unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing, or inquiry held by that public body, or a court action.

The WPA was intended to "protect employees who alert the public to 'corruption or criminally irresponsible behavior in the conduct of government or large businesses.'" *Dolan v Continental Airlines/Continental Express*, 454 Mich 373, 381; 563 NW2d 23 (1997), quoting *Dudewicz v Norris Schmid, Inc*,443 Mich 68, 75; 503 NW2d 645 (1993). As a remedial statute, the WPA is to be "liberally construed in favor of the persons intended to be benefited." *Dudewicz, supra* at 77.

In order to establish a WPA claim, the plaintiff must show that (1) he or she was engaged in protected activity as defined by the WPA, (2) the defendant terminated the plaintiff, and (3) a causal connection exists between the protected activity and the termination. *Chandler v Dowell Schlumberger, Inc*, 456 Mich 395, 399; 572 NW2d 210 (1998); *Phinney, supra*. '"Protected activity' under the WPA consists of (1) reporting to a public body a violation of a law, regulation, or rule; (2) being about to report such a violation to a public body; or (3) being asked by a public body to participate in an investigation." *Chandler, supra*.

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[2] We also note that, even if we had not concluded that estoppel applied to defendant's argument, we also conclude that defendant's argument is without merit that the "continuing violations doctrine" did not apply in this case. After applying the three factors (subject matter, frequency, and permanence) of the "continuing course of conduct" subtheory of the "continuing violations doctrine" to the defendant's actions, we conclude that the trial court properly found that sufficient evidence existed regarding whether there was a continuing course of conduct such that the jury should decide the issue. *Phinney, supra*.

In *Phinney, supra* at 554-555, the plaintiff's reports of violations or suspected violations of law to several University of Michigan employees were sufficient to satisfy the "public body" requirement, even though the reports were not made to a "higher authority," because the University of Michigan satisfied the statutory definition of a public body as stated in MCL 15.361(d); MSA 17.428(1)(d). Likewise, plaintiff is protected by the WPA because he reported violations to a public body. First, Wayne County and its employees are considered to be public bodies under the WPA. MCL 15.361(d); MSA 17.428(1)(d). Second, evidence was presented at trial that plaintiff made reports to numerous Wayne County employees, including some of his superiors, regarding the violations and suspected violations of law at the Wayne County Medical Examiner's Office. Some of plaintiff's suspected violations involved the manipulation of autopsy results, the sexual harassment of employees, Dr. Cassin's attempts to suborn perjury and obstruct justice in the Malice Green case, necrophilia, and the theft or attempted destruction of files and evidence.

Further, contrary to defendant's argument, sufficient evidence was presented regarding the nexus between the retaliatory actions and the protected activity and regarding whether defendant's alleged nondiscriminatory reasons for terminating plaintiff was a pretext. *Phinney, supra* at 555. Evidence presented at trial supported plaintiff's assertion that he was terminated for reasons other than defendant's stated reason that plaintiff took an unapproved five-day vacation. For example, a December 2, 1994, Detroit News article, written two months before plaintiff's vacation and admitted into evidence at trial, predicted that plaintiff "may be gone [from the morgue] soon." Further, before plaintiff's termination in February, 1995, for allegedly taking an unapproved vacation, Dr. Bader Cassin advised plaintiff that he would probably be terminated in the near future. In addition, although Dr. Cassin had no recollection of granting the vacation request, plaintiff testified that Cassin had approved his vacation request for February, 1995. Plaintiff had 160 hours of accumulated vacation time as of February, 1995. Dr. Cassin, who had been employed with defendant for seven years, testified that he knew of no employee of the medical examiner's office who had been terminated for not showing up for work until that person returned to work and was given an opportunity to explain the absence. Dr. Cassin also testified that he attended a meeting in January, 1995, with plaintiff and Dale Jurcisin where "most of the meeting" was about "the county" wanting plaintiff's resignation. Kalam Muttalib, an attorney, testified that he spoke with Jurcisin in late 1994 or early 1995 regarding plaintiff's situation with defendant and also saw a letter extending an offer of termination to plaintiff. Muttalib testified that Jurcisin and the letter stated that plaintiff had two options, resign with a severance agreement or be terminated. The evidence also revealed that plaintiff had excellent skills and qualifications and that the medical examiner's office suffered from a shortage of medical examiners after plaintiff's termination. Although testimony was presented that plaintiff's employment was terminated for absenteeism, i.e., taking an unapproved vacation and for no other reason, the jury apparently did not believe this testimony.

Further, evidence also supported plaintiff's claim that defendant's other actions were in retaliation for plaintiff's whistleblowing. For example, when Officers Budzyn and Nevers sued plaintiff and other former defendant employees in the Malice Green matter, defendant refused to provide legal representation for plaintiff even though it provided representation for the other former employees. In addition, although plaintiff was entitled to an administrative hearing within two weeks of his dismissal

pursuant to MCL 38.416; MSA 5.1191(16), plaintiff was refused a hearing for nine months until he filed this action. Thus, viewing the above evidence in the light most favorable to plaintiff, a jury could reasonably find that plaintiff was terminated because of his whistleblowing, that the other acts committed by defendant were in retaliation for plaintiff's whistleblowing, and that the absenteeism reason for terminating plaintiff was a pretext. *Phinney, supra* at 555-556.

Defendant asserts that the trial court should have precluded plaintiff from pursuing any claim for wrongful discharge in violation of public policy because plaintiff was a just cause employee. Defendant further asserts that plaintiff's public policy claim, in any event, is barred by governmental immunity. We agree that plaintiff's public policy claim should have been precluded, but the claim should have been unavailable because it was preempted by the WPA. Because of this conclusion, we need not address defendant's assertions regarding the governmental immunity and just cause employee issues.

In Michigan, the remedies provided by the WPA are exclusive and not cumulative. *Dudewicz, supra* at 79; *Shuttleworth v Riverside Osteopathic Hosp*, 191 Mich App 25, 27; 477 NW2d 453 (1991). Thus, any public policy claim of wrongful discharge arising out of the same facts is preempted by the WPA. *Dudewicz, supra* at 70, 78; see, also, *Dolan, supra* at 381-383. "A public policy claim is sustainable . . . only where there also is not an applicable statutory prohibition against discharge in retaliation for the conduct at issue." *Dudewicz, supra* at 80 (because the WPA provided relief to the plaintiff for reporting his fellow employee's illegal activity, his public policy claim was not sustainable).

In the present case, his valid claim under the WPA preempts plaintiff's public policy claim of wrongful discharge. However, no reversal is required with respect to damages because plaintiff's valid WPA claim allows for emotional damages. *Phinney*, *supra* at 559-560. Here, defendant failed to object[3] to the special verdict form that allowed single awards of economic and non-economic damages if plaintiff prevailed on the WPA claim or the tortious wrongful discharge based on public policy claim. As plaintiff correctly states, the jury could have awarded both economic and non-economic damages based on the WPA claim alone. *Hall v Citizens Insurance Co of America*, 141 Mich App 676, 686, 689-690; 368 NW2d 250 (1985) (this Court reversed some of the plaintiff's claims, but did not reduce the amount of exemplary damages awarded to the plaintiff because the special verdict form made "it impossible to determine which of the substantive tort theories formed the basis of the jury's award of exemplary damages"). Further, because defendant failed to request an instruction that the jury apportion damages between each of plaintiff's claims, no reversal is required. MCR 2.516(C); MCR 2.514(A); *Hammack v Lutheran Social Services of Michigan*, 211 Mich App 1, 10; 535 NW2d 215 (1995); *Hall, supra* at 686-687.

[3] The lower court record indicates that the trial judge asked the parties whether they had looked at the verdict form and whether it was okay. Further, the trial judge told the parties that objections to the jury instructions or the verdict form could be placed on the record so as to preserve the objections. Although defendant did raise one objection, defendant did not object to that portion of the special verdict form that allowed single awards of economic and non-economic damages if plaintiff prevailed on the WPA claim or the tortious wrongful discharge based on public policy claim.

Defendant also asserts that a new trial is warranted because plaintiff's trial counsel made improper comments, thereby depriving defendant of a fair trial. We disagree and conclude that, even assuming that the complained-of comments made by plaintiff's counsel at trial were improper, the comments did not taint the verdict and exceed permissible bounds such that reversal of the jury verdict is required. *Reetz v Kinsman Marine Transit Co*, 416 Mich 97, 103; 330 NW2d 638 (1982); *Badalamenti v William Beaumont Hosp - Troy*, 237 Mich App 278, 289; 602 NW2d 854 (1999).

Whether to grant a new trial is in the trial court's discretion, and its decision will not be reversed absent a clear abuse of that discretion. *Setterington v Pontiac Gen'l Hosp*, 223 Mich App 594, 608; 568 NW2d 93 (1997). In reviewing a claim that a trial was tainted by the improper conduct of trial counsel, the appellate court should

> first determine whether or not the claimed error was in fact error and, if so, whether it was harmless. If the claimed error was not harmless, the court must then ask if the error was properly preserved by objection and request for instruction or motion for mistrial. If the error is so preserved, then there is a right to appellate review; if not, the court must still make one further inquiry. It must decide whether a new trial should nevertheless be ordered because what occurred may have caused the result or played too large a part and may have denied a party a fair trial. If the court cannot say that the result was not affected, then a new trial may be granted. Tainted verdicts need not be allowed to stand simply because a lawyer or judge or both failed to protect the interests of the prejudiced party by timely action. [*Reetz, supra*.]

We conclude that the trial court did not abuse its discretion in denying defendant's motion for a new trial. *Setterington, supra*. Here, many of the comments that defendant claims were improper were made in plaintiff's complaint, written responses to defendant's motions, and at motion hearings outside the presence of the jury. Because these comments occurred outside the presence of the jury and could not have tainted the jury verdict, see *Reetz, supra*, this Court need not address whether the comments were improper. With respect to other alleged improper comments made during opening and closing arguments and during the course of trial, we conclude that reversal is not warranted because the misconduct was not egregious enough to have diverted the jury from considering the merits of the case. *Bd of Co Rd Comm'rs of the Co of Wayne v GLS LeasCo, Inc*, 394 Mich 126, 139; 229 NW2d 797 (1975); *Badalamenti, supra* at 292; *Guider v Smith*, 157 Mich App 92, 102-103; 403 NW2d 505 (1987), aff'd on other grounds 431 Mich 559; 431 NW2d 810 (1988). Even if counsel erred in making the comments and that the comments were not harmless, defense counsel could have requested a curative instruction or moved for a mistrial. *Reetz, supra*. Moreover, after reviewing the comments in question, we are not convinced that the trial court should have ordered a new trial "because what occurred may have caused the result or played too large a part and may have denied a party a fair trial." *Id*.

In comparison to the cases of *GLS LeasCo* and *Badalamenti* where it was suggested that misconduct occurred throughout the entire record of proceedings, the complained-of comments in the present case were not "sufficiently numerous and prejudicial as to require retrial." *Benmark v Steffen*,

9 Mich App 416, 428; 157 NW2d 468 (1968) (this Court reverses the trial court after finding that the trial court abused its discretion in granting a new trial on the claim that counsel engaged in misconduct); see, also, *Lincoln v Gupta*, 142 Mich App 615, 623-624; 370 NW2d 312 (1985) (the plaintiff was not denied a fair trial because of defense counsel's one-time reference to a covenant not to sue and defense counsel's references to racism). Unlike the numerous comments made in *GLS LeasCo, Badalamenti,* and *Reetz*, plaintiff's counsel in the present case did not make the same type of repeated comments as did the attorneys in the cases cited above, nor were many of them made in the presence of the jury. Also, we do not find the statements to be egregious. The instant case lasted approximately five weeks and produced over 3,000 pages of transcript. In addition, the trial court told the jury on two separate occasions that the statements and arguments made by the attorneys did not constitute evidence, and, specifically, at the end of the trial, the court instructed the jury that it "should disregard anything said by an attorney which is not supported by evidence." *Dunn v Lederle Laboratories*, 121 Mich App 73, 91; 328 NW2d 576 (1982) (even though defense counsel's conduct may have been improper, a new trial was not warranted after considering, inter alia, that "[p]roper jury instructions regarding the statements of attorneys were given" by the trial court). Plaintiff's counsel's comments were not "so prejudicial" as to deny defendant a fair trial, *Lincoln, supra* at 624, and were not "egregious enough" to divert the jury from considering the merits of the case, *Guider, supra*.

Further, after a review of the record, it appears that defense counsel also engaged in some "verbal jousting" during the trial. *Dunn, supra* at 90-91 (although counsel's remarks "may have been improper," a new trial was not warranted after attorneys for both parties "engaged in frequent verbal jousting); see, also, *Guider, supra* (the plaintiff's counsel's alleged misconduct, which involved personal attacks on defense counsel's honesty and integrity, the mentioning of multi-million dollar awards, appeals to sympathy, and the use of so-called extravagant language, was not "egregious enough" to deny the defendant a fair trial after both parties' attorneys "spent as much energy verbally attacking each other and each other's clients as they did presenting the merits of their case").

We affirm the trial court's orders in all respects, except that the portion of the order of judgment entered on the jury verdict in favor of plaintiff on the wrongful discharge in violation of public policy claim is reversed.

/s/ Jane E. Markey
/s/ Martin M. Doctoroff
/s/ William B. Murphy